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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25 of
the Commission's Rules to Redesignate the 27.5-
29.5 GHz Frequency Band, to Reallocate the
29.5-30.0 GHz Frequency Band, to Establish
Rules and Policies for Local Multipoint
Distribution Service and For Fixed Satellite
Services

Petitions for Reconsideration of the Denial of
Applications for Waiver of the Commission's
Common Carrier Point-to-Point Microwave Radio
Service Rules

Suite 12 Group Petition for Pioneer Preference

CC Docket No. 92-297

PP-22

REPLY COMMENTS OF SPRINT CORPORATION

Pursuant to the Second Report and Order, Order on Reconsideration, and Fifth
Notice of Proposed Rulemaking released by the Federal Communications Commission
("FCC" or "Commission") on March 13, 1997 in the above-captioned proceeding,¹ Sprint
Corporation ("Sprint") responds to comments filed by WebCel Communications, Inc.
("WebCel") with the Commission on April 21, 1997.

¹ See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to
Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz
Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service
and for Fixed Satellite Service; Petitions for Reconsideration of the Denial of Applications
for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service
Rules; Suite 12 Group Petition for Pioneer Preference, Second Report and Order, Order on
Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC
97-82 (Mar. 13, 1997) ("Second Report and Order" and "5th NPRM").

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I. INTRODUCTION AND SUMMARY

In establishing the general service and auction rules for the Local Multipoint Distribution Service ("LMDS"), the Commission determined that local exchange telephone providers ("LECs") and cable companies should be allowed to hold out-of-region 1.15 GHz LMDS licenses, provided that there is no significant overlap² between a company's service area and its LMDS license area.³ Thus, the Commission will allow LECs and cable companies to bid on and acquire any Basic Trading Area ("BTA") license, provided that within 90 days of the grant of an LMDS license, the LEC or cable company divests itself of sufficient attributable interests in either portions of its LMDS market area that may overlap its service area or portions of its LEC or cable service area within the LMDS overlap area.

WebCel now asks the FCC, in effect, to reconsider its decision to allow LECs and cable companies to bid in the LMDS auction for licenses in markets that significantly overlap their local telephone and cable service areas or franchises.⁴ WebCel speculates that, if permitted to bid for any LMDS license, LECs and cable companies will engage in anticompetitive conduct during the course of the auction to the detriment of other auction participants.⁵ WebCel's comments, however, go to issues that the Commission already has decided correctly and that are not properly raised in the instant 5th NPRM. Rather, eligibility issues that concern WebCel should be raised, if anywhere, in a timely brought petition for reconsideration. In any event, WebCel has failed to provide any support for its

² See 47 C.F.R. § 101.1003(d) (a significant overlap exists when 10 percent or more of the population of the LMDS BTA is within the LEC or cable company's authorized or franchised service area).

³ See *Second Report and Order* at ¶ 160, 193.

⁴ WebCel Comments at 4. Although WebCel and other commenters address a number of issues raised in the 5th NPRM, Sprint limits its reply to the LEC and cable company eligibility issue raised by WebCel.

⁵ *Id.* at 12.

speculative claims that would unreasonably restrict the LEC and cable companies' ability to effectively and efficiently utilize LMDS spectrum.

II. THE COMMISSION HAS RESOLVED THE ELIGIBILITY ISSUES RAISED BY WEBCEL

WebCel attempts to frame its arguments regarding LEC/cable eligibility restrictions by suggesting that the unrestricted partitioning and disaggregation of LMDS licenses proposed by the Commission in the 5th NPRM somehow requires the Commission to reconsider its eligibility rules in the Second Report and Order. The Commission, however, has thoroughly considered LEC and cable company participation in LMDS and has reached a reasonable decision on the issue, rendering WebCel's comments nothing more than an attempt to reargue issues raised and fully considered during earlier stages of this proceeding. In adopting the Second Report and Order, the Commission specifically addressed the identical concerns and arguments that WebCel raises again in its comments.⁶ The Commission concluded that post auction divestiture requirements adequately answered these concerns, and that LECs and cable companies should be allowed to participate in 1.15 GHz LMDS spectrum auctions.

"It is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved."⁷ WebCel must present new facts and arguments and must state with particularity the respects in which the Commission's actions should be changed.⁸ WebCel has not met its burden of explaining why the Commission's decision to permit

⁶ See *Second Report and Order* at ¶ 154; *WebCel Comments in the 4th NPRM* at 14 (WebCel proposes "transitional auction eligibility rules that would bar LECs and cable systems from bidding" for LMDS licenses in their service areas so that those entities cannot "forestall facilities-based local competition.").

⁷ *Implementation of the AM Expanded Band Allotment Plan*, Memorandum Opinion and Order, MM Docket No. 87-267, FCC 97-68 (Mar. 17, 1997). See also *WWIZ, Inc.*, 37 FCC 2d 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

⁸ 47 C.F.R. § 1.429.

LECs and cable companies to bid on LMDS BTAs covering markets that overlap their existing service areas, subject to divestiture, should be changed.

III. WEBCEL PROVIDES NO REASONABLE BASIS FOR RECONSIDERATION OF THE COMMISSION'S DECISION

A. WebCel's Arguments Do Not Support a Blanket Restriction on LEC/Cable Participation In In-Region Market Auction

Even if it had properly brought its comments as part of a reconsideration proceeding, WebCel has failed to provide any acceptable basis for overturning the Commission's decision permitting LECs and cable companies to bid on BTAs that overlap their existing service areas. The Commission properly determined that LEC and cable company participation in the LMDS auction, subject to divestiture, provides the best balance between encouraging rapid development and efficient utilization of the LMDS spectrum and preventing anticompetitive conduct by LECs and cable companies.⁹ Wholly speculative assertions of *potential* anticompetitive acts by LECs and cable companies are the only support offered by WebCel for its position. Such claims are not a basis for reconsideration.

WebCel initially claims that the Commission's new LMDS rules will not prevent a LEC or cable company from pricing new entrants out of the auction and later selling the spectrum to an entity that commits to using it to provide only services that the LEC or cable company does not provide, or simply defaulting on its license payments, losing its down payment and paying the substantial default penalties in order to delay competitive entrants.¹⁰ Both of these scenarios not only would violate FCC policy and federal antitrust laws, but make no economic or business sense.

WebCel's further speculative claims that the divestiture requirement will be ineffectual because a LEC or cable company unable to find a buyer for overlapping

⁹ See *Second Report and Order* at ¶¶ 162-181, 193-196.

¹⁰ *WebCel Comments* at 14.

spectrum can transfer the spectrum to a trustee, or more improbably, file a “sham application for a waiver”¹¹ raises no issues of competitive harm at all. The transfer of overlapping LMDS spectrum to a trustee effectively completes the divestiture since Commission rules require that the trustee cannot be an affiliated or controlled entity and must be free to dispose of the spectrum as it sees fit.¹² The LEC or cable company, therefore, retains no control over the spectrum and cannot use it in an anticompetitive manner. Moreover, any waiver petition filed by a LEC or cable company must meet exacting standards under the Commission’s rules. It is rank speculation to suggest that a “sham waiver application” would survive Commission scrutiny.¹³ WebCel’s highly speculative and conclusory arguments cannot support a Commission decision to alter its decision to allow LECs and cable companies to bid on BTAs that overlap their existing service areas.

B. Allowing LECs and Cable Companies to Bid For and Acquire BTAs That Overlap With Their Existing Service Areas Promotes The Congressional Mandate For Efficient Spectrum Utilization

LEC and cable company participation in the LMDS auction subject to a subsequent divestiture requirement serves the Congressional mandate that Commission rules must promote the most efficient utilization of the auction spectrum. WebCel’s approach, however, would frustrate Congress’s goal by requiring LECs and cable companies to engage in after market partitioning and disaggregation to build LMDS systems. The added uncertainty and transactional costs inherent in this approach, given the total lack of evidence of competitive harm stemming from the new LMDS rules, is unnecessary.

¹¹ *WebCel Comments* at 14.

¹² 47 C.F.R. § 101.1003(f)(1)(c).

¹³ 47 C.F.R. § 101.1003(a)(2) (To be eligible for a waiver, a LEC or cable company must demonstrate that it “no longer has market power in its authorized or franchised service area as the result of the entry of new competitors, other than an LMDS licensee, into such service area.”).

Moreover, WebCel's arguments assume that the LEC's and cable companies' business strategies will be to divest themselves of that portion of the LMDS spectrum which overlaps their service regions. While this may be the case, it is just as likely that a company could choose to divest itself of its attributable interest in the local telephone exchange or cable system.¹⁴ Indeed, following the Personal Communications Service ("PCS") auction, at least one participant holding overlapping cellular interests found it more reasonable and efficient from a business perspective to completely divest itself of its cellular interests in favor of the newly acquired PCS licenses, rather than divest cellular interests in a piecemeal fashion, in order to comply with the then existing cellular eligibility restrictions.¹⁵

IV. CONCLUSION

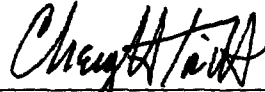
WebCel in effect uses the rulemaking process improperly to seek reconsideration of the FCC's reasoned decision to allow LEC and cable companies to bid in the LMDS auction subject to divestiture requirements. Permitting LECs and cable companies to participate in the LMDS auction will help ensure that the spectrum is efficiently assigned to those entities that value it most and will make the most efficient and effective use of the spectrum to

¹⁴ See *Second Report and Order* at ¶¶ 193-194 (recognizing that LECs or cable companies might choose to sell their local exchange or cable system in order to comply with the Commission's rules).

¹⁵ See e.g., Request of WirelessCo, L.P., PhillieCo, L.P., and Sprint Corporation For Limited Waiver of Section 24.204 of the Commission's Rules, 10 FCC Rcd 11111 (1995) (granting additional time for divestiture of overlapping cellular properties to allow spin-off of all cellular assets).

develop new competitive services for U.S. consumers. Therefore, WebCel's arguments must be rejected.

Respectfully submitted,



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Dated: May 6, 1997

CERTIFICATE OF SERVICE

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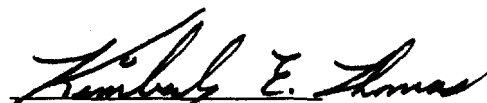
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